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# In The Supreme Court of the United States

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*Petitioners,*

v.

ALLEGHENY VALLEY LAND TRUST, ARMSTRONG COUNTY CONSERVANCY CHARITABLE TRUST, ARMSTRONG RAILS TO TRAILS ASSOCIATION, CONSOLIDATED RAIL CORPORATION, JERRY F. LONGWELL, LEE J. CALARIE, DAVID R. RUPERT, NORMAN KARP AND WILHELMINA DECOCK,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Pennsylvania Supreme Court**

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Could a railroad right-of-way be railbanked pursuant to the National Trails System Act without following the procedures of the Interstate Commerce Commission after the Commission no longer had jurisdiction over the rail line which traversed the right-of-way where: (a) the railroad voluntarily conveyed its real property interest in the right-of-way to the trail sponsor and otherwise cooperated in the creation of a rails-to-trail which was subject to restoration of rail service in the future; and (b) the trail sponsor fulfilled the substantive requirements of the Act?

2. Does the Pennsylvania Supreme Court's holding that railbanking occurred in accordance with the National Trails System Act conflict with federal law where: (a) the holding furthers the purposes of the Act; (b) the Act does not state that railbanking can only occur pursuant to proceedings before the ICC or the Surface Transportation Board; (c) the Third Circuit in *Lucas v. Township of Bethel* carefully limited its holding solely to the issue of subject matter jurisdiction; and (d) the Interstate Commerce Commission's railbanking regulations expressly applied only to railbanking prior to abandonment of rail service and the Commission has stated that railbanking can occur under the Act without ICC authorization?

## CORPORATE DISCLOSURE STATEMENT

The Allegheny Valley Land Trust and the Armstrong Rails to Trails Association are both Non-Profit, Non-Stock corporations organized under the laws of Pennsylvania. As such no parent or publicly held company owns stock in either corporation. The Armstrong County Conservancy Charitable Trust is an unincorporated trust.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED FOR REVIEW | i |
| CORPORATE DISCLOSURE STATEMENT | ii |
| TABLE OF CONTENTS | iii |
| TABLE OF AUTHORITIES | v |
| STATUTES AND REGULATIONS INVOLVED | 1 |
| INTRODUCTION | 1 |
| COUNTERSTATEMENT OF THE CASE | 2 |
| SUMMARY OF ARGUMENT | 7 |
| REASONS WHY THE PETITION SHOULD BE DENIED | 8 |
| I. THE PENNSYLVANIA SUPREME COURT'S DECISION CORRECTLY APPLIED 16 U.S.C. §1247(d) AND FURTHERS THE PURPOSES OF THE NATIONAL TRAILS SYSTEM ACT | 8 |
| II. THE PENNSYLVANIA SUPREME COURT'S DECISION IS CONSISTENT WITH BOTH OF THE THIRD CIRCUIT'S OPINIONS IN *LUCAS v. TOWNSHIP OF BETHEL* | 15 |
| III. THE PENNSYLVANIA SUPREME COURT'S DECISION DOES NOT CONFLICT WITH THE ICC'S REGULATIONS | 20 |
| CONCLUSION | 23 |

TABLE OF CONTENTS – Continued

Page

APPENDIX

Current text of 16 U.S.C. §1247 ..... App. 1

Text of relevant portions of 49 C.F.R. §1152.29, effective June 6, 1986 ..... App. 3

Amendments to 49 C.F.R. §1152.29, effective January 9, 1988 ..... App. 8

# TABLE OF AUTHORITIES

Page

CASES

*Becker v. Surface Transportation Board*, 132 F.3d 60 (D.C. Cir. 1997).....15

*Buffalo Township v. Jones*, 571 Pa. 637, 813 A.2d 659 (2003), cert. den., 540 U.S. 821, 124 S. Ct. 134, 157 L. Ed. 2d 41 (2003).....12, 17, 19

*Chevy Chase Land Co. v. United States*, 355 Md. 110, 733 A.2d 1055 (1999).....14

*Fritsch v. Interstate Commerce Commission*, 50 F.2d 248 (D.C. Cir. 1995).....15

*Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 97 S. Ct. 1303, 51 L. Ed. 2d 604 (1985).....13

*Lucas v. Township of Bethel*, 319 F.3d 595 (3d Cir. 2003).....7, 15, 16, 17

*Lucas v. Township of Bethel*, 137 Fed. Appx. 450, 2005 U.S. App. LEXIS 8584 (3d Cir. 2005)... 15, 17, 19

*Moody v. Allegheny Valley Land Trust*, 976 A.2d 484 (Pa. 2009).....11, 14

*Preseault v. Interstate Commerce Commission*, 494 U.S. 1, 110 S. Ct. 914, 108 L. Ed. 2d 1 (1990).....13, 14

*Reed v. Meserve*, 487 F.2d 646 (1st Cir. 1973).....9

*Southern Pacific Transportation Co. – Exemption – Abandonment of Service in San Mateo County, Ca.*, 1991 WL 108272 (I.C.C.) .....15, 20

TABLE OF AUTHORITIES – Continued

Page

STATUTES

16 U.S.C. §1241 .....9

16 U.S.C. §1247(d) .....*passim*

45 U.S.C. §748 .....2

32 P.S. §5611 et seq.....14

REGULATIONS

49 C.F.R. §1152.29 .....1, 15, 21, 22, 23

## STATUTES AND REGULATIONS INVOLVED

The current text of 16 U.S.C. §1247(d) is set forth in the Appendix to this brief. The relevant text of 49 C.F.R. §1152.29 as in effect at the time of the rail service abandonments in question is set forth in the Appendix of this brief. The version of 49 C.F.R. §1152.29 quoted in the Petition did not take effect until 1997.

## INTRODUCTION

The Petition for a Writ of Certiorari is premised in large part on Petitioners' repeated assertion that "Conrail admitted that it had consummated abandonment." This assertion improperly conflates the federal regulatory concept of abandonment of a railroad's common carrier obligations with state common law abandonment. The assertion is false insofar as it pertains to the crucial issue of whether, under Pennsylvania common law, Conrail abandoned its real property interest in the railroad right-of-way prior to conveying that interest to the Allegheny Valley Land Trust. In fact Conrail only admitted that the ICC had authorized it to abandon rail service on Allegheny Secondary Track and that it had terminated rail service on the rail line which traversed the right-of-way. The Pennsylvania Supreme Court, exercising plenary review of the material facts, held that Conrail had not abandoned its real property interest before it sold that interest to the Allegheny Valley Land Trust for $250,000.00.

## COUNTERSTATEMENT OF THE CASE

This Petition concerns a 33.4 mile section of former rail corridor (the "Rail Corridor") owned by Allegheny Valley Land Trust ("AVLT") and maintained by it as an interim recreational use trail pursuant to the National Trails System Act ("Trails Act"). The Rail Corridor was located in Armstrong County, Pennsylvania. The Rail Corridor was previously owned by Consolidated Rail Corporation ("Conrail"), a common carrier providing freight rail service subject to the jurisdiction of the Interstate Commerce Commission ("ICC").[1] On February 3, 1984, Conrail filed an application pursuant to Section 308(c) of the Regional Rail Reorganization Act of 1973 ("RRRA"), 45 U.S.C. §748, requesting permission from the ICC to abandon "the line of rail" between milepost 53.8 and milepost 63.4 of its Allegheny Secondary Track. The ICC gave Conrail permission to abandon its common carrier obligations to provide rail service on this section of the Rail Corridor on May 18, 1984. On March 7, 1989, Conrail filed an application under 45 U.S.C. §748 seeking the ICC's permission to abandon rail service between milepost 30 and milepost 53.8. The ICC gave Conrail permission to abandon its common carrier obligations on

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[1] On January 1, 1996, the ICC was replaced by the Surface Transportation Board ("STB"). *See* Interstate Commerce Commission Termination Act, 49 U.S.C. §§701-706, 10101-11908. Because the ICC issued the certificate of abandonment cited in these proceedings, this brief refers to the ICC.

this section of the Rail Corridor on June 16, 1989. Conrail subsequently began marketing the Rail Corridor for sale.

After nearly 16 months of negotiations, on July 11, 1991, Conrail entered into a Conditional Agreement of Sale (the "Agreement") to sell the Rail Corridor to the Armstrong County Conservancy Charitable Trust (the "Conservancy") or its nominee for $250,000.00. Under the Agreement, Conrail retained the right to sell the rails, ties, plates, spikes and other track material for up to two years. The sale included all bridges over public waterways, bridge timbers, tunnels, culverts, grade separated crossings, and ballast so that AVLT would have the infrastructure needed to create an interim use recreational trail. At the time Conrail entered into the Agreement, it was aware that the Conservancy intended to designate the Rail Corridor for interim trail use/railbanking under the Trails Act, but Conrail declined to be involved in railbanking proceedings before the ICC on advice of counsel. The Agreement specified that Conrail would not be obligated to provide rail service along the Rail Corridor, however, Conrail did not intend to preclude other parties from restoring rail service. Indeed, the Agreement provided for the possibility that Conrail might someday resume rail service on the Rail Corridor if both parties agreed.

On January 7, 1992, Conrail transferred title to the Rail Corridor to the Conservancy's nominee, AVLT, by quitclaim deed. On January 9, 1992, AVLT filed the deed with the Armstrong County Recorder of

Deeds. Attached to the deed was a "Declaration of Railbanking" which stated, *inter alia*, that:

> The Allegheny Valley Land Trust . . . Grantee in the attached Deed from the Consolidated Rail Corporation, pursuant to the provisions of the National Trails System Act (16 U.S.C. §1247(d)) and regulations promulgated thereunder, does by the acceptance of this Deed declare that the following established railroad lands, rights-of-way, and easements which are conveyed by this Deed are preserved as an interim recreational use trail and are railbanked for future rail service, related transportation purposes or other uses as provided for by the National Trails System Act:
>
> Allegheny Secondary Branch – Milepost 30.0 to Milepost 63.4.

When Conrail conveyed title to AVLT, all of the rails, ties, crossings, bridges and other equipment needed to operate rail service along the Rail Corridor were in place. On April 6, 1992, Conrail filed an application with the Pennsylvania Public Utility Commission ("PUC") to abolish its responsibility to maintain the at-grade and grade separated road crossings along the Rail Corridor. Conrail proposed removing the rails, ties and other track material from the at-grade road crossings and transferring responsibility for grade separated crossings to AVLT, the Conservancy, and Armstrong County pursuant to an agreement among those three parties. Conrail attached that agreement to its application. Conrail's

application stated that "[t]he right of way has been sold to the Allegheny Valley Land Trust (AVLT) for trail use." On October 15, 1992, the PUC issued an order abolishing Conrail's responsibility for the at-grade road crossings and transferring responsibility for grade separated crossings to AVLT, the Conservancy, and Armstrong County. The PUC's Order stated, *inter alia*:

> In its application . . . [Conrail] seeks Commission approval to abolish the crossings of its Allegheny Secondary Track between Mileposts 30.0 and 63.4 . . . Since the railroad right-of-way has been sold to Allegheny Valley Land Trust for trail use, the railroad company proposes to abolish four grade-separated crossings in place by leaving the bridge structures remaining.

On December 28, 1992, Conrail sold the track material to a salvage company which subsequently removed most of the rails, ties, plates, signals, and other track material along the Rail Corridor. Since acquiring title from Conrail in 1992, AVLT has taken steps to preserve the Rail Corridor for future rail service and facilitate its use as an interim trail, known as the Armstrong Trail (http://www.armstrongtrail.org/). Among other things, AVLT cut weeds, removed fallen trees and maintained bridges and culverts along the Rail Corridor. AVLT also met and negotiated with various parties who expressed interest in restoring rail service along portions of the Rail Corridor. Kiski Junction Railroad is poised to restore rail service to approximately nine miles of the Rail Corridor.

This action was brought by Petitioners to quiet title in their favor and to recover damages under related Pennsylvania common law claims, based on their contention that Conrail had "abandoned the easements and rights of way" in question prior to the sale to AVLT. The Court of Common Pleas of Armstrong County held that Conrail abandoned the Rail Corridor as of June 16, 1989, the date the ICC gave Conrail permission to abandon rail service between milepost 30 and milepost 53.8 of the Allegheny Secondary Track, because Conrail did not agree to railbank the corridor pursuant to the ICC's procedures. On appeal by Respondents, a three judge panel of the Pennsylvania Superior Court held that (1) the trial court erred in ruling that Conrail had abandoned its real property interest in the Rail Corridor and (2) that "AVLT has met the necessary federal requirements to rail-bank the Rail Corridor." (App. 69). Petitioners' application for reargument *en banc* before the Superior Court was denied.

The Pennsylvania Supreme Court granted Petitioners' Petition for Allowance of Appeal. That Court then held: (1) that the Rail Corridor had been railbanked pursuant to the Trails Act, notwithstanding that AVLT did not attempt to railbank pursuant to the Interstate Commerce Commission's regulations and that, therefore, the Rail Corridor did not revert to Petitioners under Pennsylvania common law (by a 6-0 vote); and (2) that the railbanking pursuant to the Trails Act did not effect a taking in view of the Court's interpretation of the language of the deed used to

create the Rail Corridor in the 19th century (by a 4-2 vote).[2] Petitioners do not seek review of the second holding, which is based solely on Pennsylvania common law.

## SUMMARY OF ARGUMENT

No compelling reason exists to review the Pennsylvania Supreme Court's decision. It is not even clear that the decision presents a question of federal law. In any event the decision furthers the purposes of the National Trails System Act by allowing railbanking in situations where the former Interstate Commerce Commission, and present day Surface Transportation Board, lack jurisdiction. The Trails Act does not state that railbanking can only occur pursuant to proceedings before the ICC or the Surface Transportation Board. The ICC has stated in a published decision that railbanking could occur under the Trails Act without the Commission's authorization where it lacked jurisdiction.

The decision does not conflict with the Third Circuit's holding in *Lucas v. Township of Bethel*. The Third Circuit carefully limited its holding to the issue of whether the District Court had subject matter jurisdiction over the adjoining landowners' claims.

[2] Justice McCaffrey authored the Superior Court's opinion before ascending to the Supreme Court, but recused himself from the Supreme Court appeal, in accordance with that Court's practice.

If anything the Third Circuit's treatment of the landowners' arguments in that case supports the Pennsylvania Supreme Court's decision.

The Pennsylvania Supreme Court's decision does not conflict with the Interstate Commerce Commission regulations which were in effect at the time of the rail service abandonments in question, or with ICC or federal court decisions interpreting those regulations. The ICC lacked jurisdiction and, therefore, its regulations did not apply once Conrail consummated abandonment of rail service. Conrail voluntarily conveyed its real property interest in the Rail Corridor and otherwise cooperated with AVLT's preservation of the Rail Corridor by creating the Armstrong Trail.

## REASONS WHY THE PETITION SHOULD BE DENIED

### I. THE PENNSYLVANIA SUPREME COURT'S DECISION CORRECTLY APPLIED 16 U.S.C. §1247(d) AND FURTHERS THE PURPOSES OF THE NATIONAL TRAILS SYSTEM ACT.

As originally enacted in 1968 the Trails Act sought "to provide for the ever-increasing outdoor recreation needs of an expanding population and . . . to promote the preservation of, public access to, travel within, and enjoyment and appreciation of the open-air, outdoor areas and historic resources of the Nation

[by establishing trails] (i) primarily, near the urban areas of the Nation, and (ii) secondarily, within scenic areas and along historic travel routes of the Nation." 16 U.S.C. §1241. In 1983 Congress sought to better implement the Trails Act's original purpose and to preserve rights-of-ways on which rail service was being abandoned by adding 16 U.S.C. §1247(d), whose current text is quoted in Respondents' Appendix.

As the First Circuit presciently observed in another context a decade before §1247(d) was enacted:

> But even a tiny scenic railroad might be thought to contribute much more to such objectives than uses that would require the tracks and right of way to be destroyed. To assemble a right of way in our increasingly populous nation is no longer simple. A scarcity of fuel and the adverse consequences of too many motor vehicles suggest that society may someday have need either for railroads or for the rights of way over which they have been built. A federal agency charged with designing part of our transportation policy does not overstep its authority when it prudently undertakes to minimize the destruction of available transportation corridors painstakingly created over several generations.

*Reed v. Meserve*, 487 F.2d 646, 649-650 (1st Cir. 1973).

Section 1247(d) established two substantive requirements in order to railbank a right-of-way: (1)

the trail must be subject to restoration of rail service; and (2) the trail sponsor must take responsibility for trail management, legal liability, and payment of taxes. Section 1247(d) also directed the Interstate Commerce Commission to impose terms and conditions to ensure that those requirements were met in rail service abandonment proceedings (i.e. in administering the Railroad Revitalization and Regulatory Reform Act of 1976). It did not establish a procedural requirement that prospective trail sponsors proceed before the then existing Interstate Commerce Commission.

The Pennsylvania Supreme Court summarized the issues before it and its holding as follows:

> We granted Appellant's petition for allowance of appeal to address: 1) whether the Superior Court erred in a) reversing the trial judge's determination that Conrail, as a matter of law, intended to abandon the easement without railbanking; and b) holding that sale of a former railroad easement to a private trail sponsor results in a railbanking and that trail use constituted continued rail use under Pennsylvania law; and 2) whether the Superior Court's holding in favor of the Appellees resulted in an unconstitutional taking of Appellants' property. The questions presented are questions of law and this Court's scope of review is therefore plenary. [Citation omitted].
>
> In this case, the parties agree on all material facts, but characterize the legal import of

> those facts very differently. The essence of the dispute is whether an effort to railbank a railroad right-of-way via the private railbanking process can be effective if the railroad does not agree to be bound to resuscitate service if directed to do so at a later date. We hold that the manner of railbanking at issue here was effective and a railbanking did result. Accordingly, Appellants' claim that the right-of-way was abandoned, and the easement over their land extinguished, is without merit and we therefore affirm the Superior Court.

*Moody v. Allegheny Valley Land Trust*, 976 A.2d 484, 487 (Pa. 2009), (App. 5-6).

The Pennsylvania Supreme Court held that Conrail's former right-of-way had been railbanked in accordance with §1247(d) because the statute's substantive requirements were met by AVLT:

> Here, the AVLT has taken on all of the obligations required by the [Trails] Act, including that the right-of-way be preserved for future rail service. The AVLT must relinquish the right-of-way if it is required for future rail use. Because the requirements of the [Trails] Act have been met, the right-of-way has been properly railbanked and there was no abandonment and reversion to Appellants.

976 A.2d at 490, (App. 11).

The requirement that interim trail use be subject to restoration or reconstruction for railroad purposes is met by AVLT's Declaration of Railbanking, in which it undertook to preserve the right-of-way as an interim recreational use trail which was railbanked for future rail service or other uses as provided by the Trails Act. The Declaration is binding on AVLT because in Pennsylvania if a railroad right-of-way ceases to be used for railroad purposes the railroad's (or its successor's) interest reverts to the owners of the adjoining servient estates. *Buffalo Township v. Jones*, 571 Pa. 637, 813 A.2d 659, 664 (2003), cert. den., 540 U.S. 821, 124 S. Ct. 134, 157 L. Ed. 2d 41 (2003).

Section 1247(d)'s second substantive requirement was met by AVLT's purchase of Conrail's interest in the right-of-way. As the trail sponsor AVLT manages the right-of-way. As the owner and possessor of the right-of-way AVLT necessarily is the entity which is responsible for any legal liability arising from, and any taxes assessed, on the right-of-way. Since 1992 AVLT has taken numerous actions to fulfill the Act's requirements, such as constructing over 15 miles of improved trail surface, converting numerous bridges and grade separated crossings to trail use, maintaining insurance coverage on its property, paying real estate taxes, and performing maintenance activities along the entire Rail Corridor except where several Petitioners have erected barricades.

Petitioners' contention that the Pennsylvania Supreme Court's decision violates the Supremacy Clause is a non sequitur. As stated in the Petition, the Supremacy Clause "invalidates state laws that 'interfere with, or are contrary to' federal Law", citing *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 712, 97 S. Ct. 1303, 51 L. Ed. 2d 604 (1985). Petitioners have set up the proposition that the federal government has exclusive power to regulate interstate railroad transportation and to pre-empt contrary state law, as a straw man. AVLT does not dispute this proposition, but here the Pennsylvania Supreme Court has properly given effect to federal law rather than overriding it by applying contrary state law. Having concluded that AVLT had satisfied §1247(d)'s requirements, the Court held that AVLT's interim use of the Rail Corridor did not constitute an abandonment of use for railroad purposes.

In so holding the Court correctly disregarded the Petitioners' contention that "Conrail admitted that it had consummated abandonment." As this Court recognized in *Preseault v. Interstate Commerce Commission*, 494 U.S. 1, 110 S. Ct. 914, 108 L. Ed. 2d 1 (1990) there are two distinct types of abandonment. Questions pertaining to abandonment of a common carrier's obligations to provide rail service are subject to the Surface Transportation Board's (formerly the ICC's) exclusive and plenary jurisdiction. Questions pertaining to whether a railroad has abandoned its real property interest in a right-of-way, with resultant reversion of that interest to adjoining

landowners,[3] generally are governed by state law. 494 U.S. at 8. In response to Petitioners' Requests for Admissions 27, 29, 30, 40 and 44 Conrail objected to Petitioners' failure to define what they meant by "consummation of abandonment" and admitted only that the ICC had issued Certificates of Abandonment and that rail service had been terminated over the right-of-way in question. (App. 116-117 and 119).

The Pennsylvania Supreme Court's opinion is not explicit as to whether it was giving preemptive effect to 16 U.S.C. §1247(d), or whether it was ruling that there was no abandonment as a matter of Pennsylvania common law in light of the "strong public policy interests that support promotion of rail-banking" (976 A.2d at 489, App. 10) which are manifested by both the Trails Act and Pennsylvania's Rails to Trails Act, 32 P.S. §5611 et seq. Either way, the decision advances the policy on which the Trails Act is based by allowing the creation of a recreational trail which prevents the right-of-way formerly owned by Conrail from reverting to Petitioners. Petitioners' argument that the supremacy of federal law is violated by allowing the creation of a trail where §1247(d)'s requirements have been met, in a situation

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[3] *See Chevy Chase Land Co. v. United States*, 355 Md. 110, 168-69, 733 A.2d 1055, 1086 (1999): "the acts alleged to support a finding of abandonment of the state law property interest relate primarily to the railroad's plans to undertake an abandonment proceeding before the ICC. . . . We believe that appellants unnecessarily confuse the state law question by relying on actions taken by the railroads to comply with regulatory 'abandonment' under federal law."

where the ICC no longer had jurisdiction because Conrail had consummated its abandonment of rail service, but was willing to convey its real property interest to a qualified trail sponsor, embodies a peculiarly perverse logic.[4]

Finally, before it was replaced by the Surface Transportation Board the ICC expressed the view that railbanking could occur under §1247(d) without ICC authorization when the Commission lacked jurisdiction. *Southern Pacific Transportation Co. – Exemption – Abandonment of Service in San Mateo County, Ca.*, 1991 WL 108272 (I.C.C.). The Pennsylvania Supreme Court's decision is consistent with that case, which will be discussed in greater detail below.

## II. THE PENNSYLVANIA SUPREME COURT'S DECISION IS CONSISTENT WITH BOTH OF THE THIRD CIRCUIT'S OPINIONS IN *LUCAS v. TOWNSHIP OF BETHEL*.

In 1998 Petitioners William Lucas, A. J. Lucas, David Kushon and Janie Kushon filed a separate action against the Township of Bethel and others as the result of AVLT's having authorized the township

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[4] Petitioners' attempted reliance on *Becker v. Surface Transportation Board*, 132 F.3d 60 (D.C. Cir. 1997) and *Fritsch v. Interstate Commerce Commission*, 50 F.2d 248 (D.C. Cir. 1995) is misplaced because those decisions merely hold that the ICC and STB no longer have jurisdiction to issue Notices of Interim Trail Use under 49 C.F.R. §1152.29 once abandonment of rail service has been consummated. The cases say nothing about private railbanking.

to remove ballast from Conrail's former right-of-way.[5] In addition to asserting various state law claims, those plaintiffs alleged that the removal of ballast violated 28 U.S.C. §1983. The District Court granted the defendants' motion to dismiss on the basis that plaintiffs' claims were subject to the exclusive jurisdiction of the Surface Transportation Board (the ICC having been abolished in 1996). The Third Circuit reversed the dismissal. *Lucas v. Township of Bethel*, 319 F.3d 595 (3d Cir. 2003) ("*Lucas I*").

The Third Circuit stated the issue before it as follows: "This jurisdictional dispute requires us to decide whether the District Court or the Surface Transportation Board (STB) has authority to resolve a property claim involving a defunct railroad line." 319 F.3d at 596. The Court's sole holding was that: "the ICC's unconditional authorization of abandonment was sufficient to end its jurisdiction over the Allegheny Secondary Track." *Id.* at 597. The essential basis for this holding was that "[t]he ICC clearly indicated its intent to end federal regulation of the Allegheny Secondary Track. Thus, there is no jurisdictional bar to the District Court resolving a property dispute based on the effect of actions Conrail took after the ICC gave it carte blanche to cease rail service." *Id.* at 601.

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[5] The Lucases and the Kushons were represented by the father of Petitioners' present counsel. The senior Mr. Smith also served as counsel for Petitioners until health issues led him to relinquish that role to his son.

Although the Third Circuit stated that "the ICC was never asked to intervene and prevent abandonment by certifying an interim trail use under the National Trail Act. Thus, the Act's provisions are inapplicable to this case"; that statement is *dictum*. Moreover, it is clear from the opinion as a whole that the Court's focus was the respective subject matter jurisdiction of the District Court and the ICC/STB, not on the issue of whether railbanking could be accomplished under §1247(d) when the ICC's jurisdiction was terminated as the result of an unconditional abandonment of rail service. See 319 F.3d at 603-604.

This analysis is supported by the Third Circuit's unpublished opinion denying plaintiffs' appeal after, on remand, the District Court dismissed their §1983 claim and declined to exercise jurisdiction over their state law claims. *Lucas v. Township of Bethel*, 137 Fed. Appx. 450, 2005 U.S. App. LEXIS 8584 (3d Cir. 2005). Subsequent to oral argument in *Lucas I* the Pennsylvania Supreme Court decided *Buffalo Township v. Jones*, 571 Pa. 637, 813 A.2d 659 (Pa. 2003), cert. den., 540 U.S. 821, 124 S. Ct. 134, 157 L. Ed. 2d 41 (2003) in which that Court held that a right-of-way could be railbanked pursuant to 16 U.S.C. §1247(d) without obtaining a Certificate of Interim Trail Use from the ICC/STB.[6] In affirming the District Court's

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[6] The senior Mr. Smith represented the plaintiffs in *Buffalo Township v. Jones* as well.

refusal to hear the plaintiffs' state law claims after granting defendants' motion for summary judgment on the §1983 claim, the Third Circuit stated:

> Plaintiffs argue that the District Court should exercise jurisdiction because the issue of abandonment involves both federal and state law and because there is a potential conflict between this Court's decision in *Lucas I* and a Pennsylvania decision, *Buffalo Township v. Jones*, 571 Pa. 637, 813 A.2d 659 (Pa. 2003).
>
> Plaintiffs suggest that the potential conflict between the Pennsylvania Supreme Court ruling in *Buffalo Township* and this Court's decision in *Lucas I* is a sufficient justification for the District Court to exercise supplemental jurisdiction. Plaintiffs' argument overstates the holding of *Buffalo Township*, which is not incompatible with *Lucas I*. *Lucas I* held that the jurisdiction of the Interstate Commerce Commission (ICC) is extinguished after it unconditionally authorizes a railroad's abandonment, if the railroad has not asked the ICC to intervene and prevent abandonment under the National Trail Systems Act, 16 U.S.C. § 1247(d). This Court's conclusion reflects the fact that, although the broad issue of ownership of rights of way by railroads is covered by both federal law, in the form of ICC regulation, and state law, in the area of property rights, the issue of abandonment is not a mixed question of federal and state law. Rather, once the regulatory oversight of the ICC

> ends, as it has in this case, the issue of who owns a right of way is decided as a matter of state law.
>
> Buffalo Township holds that, when adjudicating whether a right of way has been abandoned by a railroad, Pennsylvania law requires consideration of whether there was an intention to abandon the property and external acts by which such abandonment was carried out. *See Lawson v. Simonsen*, 490 Pa. 509, 417 A.2d 155, 160. The court further held that the intent to abandon is determined by a variety of factors, including whether the railroad filed a request to abandon with the ICC, salvaged the rails from the right of way, and negotiated with a third party for an alternate use of the land. *Buffalo Township*, 813 A.2d at 665. Thus, these two holdings are not incompatible, as Plaintiffs suggest, and certainly do not justify the District Court exercising jurisdiction if only pendent state law claims remain.

137 Fed. Appx. at 452. In the present matter the Pennsylvania Supreme Court indicated that its ruling was premised on *Buffalo Township v. Jones*. See 976 A.2d at 488-489, (App. 7). Accordingly, because the Third Circuit rejected the contention that its decision in *Lucas I* conflicted with *Buffalo Township v. Jones* there is no reasonable basis for the assertion that the Pennsylvania Supreme Court's decision in the present case conflicts with *Lucas I*.

## III. THE PENNSYLVANIA SUPREME COURT'S DECISION DOES NOT CONFLICT WITH THE ICC'S REGULATIONS.

In *Southern Pacific Transportation Co. – Exemption – Abandonment of Service in San Mateo County, Ca.*, 1991 WL 108272 (I.C.C.) the Commission revoked its previously issued Notice of Interim Trail Use because it concluded that it did not have jurisdiction over the rail line in question because it was a spur which was exempt from ICC regulation. The revocation occurred in the context of objections by adjoining property owners to "a decision imposing trail use/rail banking . . . under the National Trails System Act" on a 1.25 mile rail line. The concluding paragraph of the Commission's decision stated:

> We are also revoking our notice of interim trail use because we only have the authority to impose trail use conditions where we can authorize abandonment under 49 U.S.C. 10903 or 10505. Because the track at issue here is a spur, we do not have such jurisdiction over it. We note, however, that the underlying right-of-way can be preserved under 16 U.S.C. 1247(d) without ICC authorization. The second sentence of section 1247(d) applies to "any established railroad rights-of-way" and the statute itself provides that their interim trail use "shall not be treated . . . as an abandonment of the use of such rights-of-way for railroad purposes."

1991 WL 108272 (page 3).

In the present matter, although the ICC had jurisdiction over Conrail's applications to abandon rail service, as the Third Circuit held in *Lucas I*, that jurisdiction ended when Conrail consummated its abandonment of rail service. The Third Circuit's holding was consistent with the ICC's regulation governing late-filed trail use statements of a prospective trail sponsor, which state in relevant part:

> (e)(1) Where late-filed trail use statements are accepted, the Director (or designee) will telephone the railroad to determine whether abandonment has been consummated and, if not, whether the railroad is willing to negotiate an interim trail use agreement. The railroad shall confirm, in writing, its response, within 5 days. **If abandonment has been consummated, the trail use request will be dismissed.** If abandonment has not been consummated but the railroad refuses to negotiate, then trail use will be denied. If abandonment has not been consummated and the railroad is willing to negotiate, the abandonment proceeding will be reopened, the abandonment decision granting an application, petition for exemption or notice of exemption will be vacated, and an appropriate CITU or NITU will be issued.

49 C.F.R. 1152.29(e) (emphasis supplied). It would have been futile for AVLT to file an untimely trail use statement after the abandonment of rail service on the two segments of rail line in question in 1984 and 1989, respectively.

Petitioners place great weight on Conrail's refusal to negotiate a nugatory interim trail use agreement with AVLT. The Pennsylvania Supreme Court's holding in this case that railbanking had occurred because AVLT had met 16 U.S.C. §1247(d)'s requirements, however, in no way conflicts with STB decisions holding that it cannot issue a Notice of Interim Trail Use or Certificate of Interim Trail Use under 49 C.F.R. §1152.29 unless the railroad is willing to negotiate an interim trail use agreement. Conrail's sale of the right-of-way to AVLT and its cooperation in the subsequent PUC proceedings in which Conrail's responsibility for maintenance of grade separated crossing was transferred to AVLT, the Armstrong County Conservancy, and Armstrong County, were completely voluntary. Section 1247(d) does not require a trail sponsor to obtain a Notice or Certificate of Interim Trail Use pursuant to the procedures of 49 C.F.R. §1152.29, though there are obvious benefits to invoking those procedures. Petitioners again seek to sabotage the Trails Act under the guise of safeguarding it.

It is not likely that a denial of the Petition will inspire future trail sponsors to bypass the procedures of 49 C.F.R. §1152.29. The tortuous nearly fifteen year long history of the present matter is sufficient proof of that. Those procedures provide a simple, expeditious means of promoting the creation of recreational trails and preservation of railroad rights-of-way. No trail sponsor would fail to avail

itself of 49 C.F.R. §1152.29 if it had the option of doing so.

## CONCLUSION

The Petition for Writ of Certiorari should be denied because the Pennsylvania Supreme Court's decision promotes the purposes of the National Trails System Act and does not conflict with any decisions of the United States Courts of Appeal, regulations of the Interstate Commerce Commission or Surface Transportation Board, or decisions by either of those agencies.

Respectfully submitted,

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## APPENDIX

16 U.S.C. § 1247. State and local area recreation and historic trails

(a) Secretary of the Interior to encourage States, political subdivisions, and private interests; financial assistance for State and local projects. The Secretary of the Interior is directed to encourage States to consider, in their comprehensive statewide outdoor recreation plans and proposals for financial assistance for State and local projects submitted pursuant to the Land and Water Conservation Fund Act, needs and opportunities for establishing park, forest, and other recreation and historic trails on lands owned or administered by States, and recreation and historic trails on lands in or near urban areas. The Secretary is also directed to encourage States to consider, in their comprehensive statewide historic preservation plans and proposals for financial assistance for State, local, and private projects submitted pursuant to the Act of October 15, 1966 (80 Stat. 915), as amended, needs and opportunities for establishing historic trails. He is further directed, in accordance with the authority contained in the Act of May 28, 1963 (77 Stat. 49), to encourage States, political subdivisions, and private interests, including nonprofit organizations, to establish such trails.

(b) Secretary of Housing and Urban Development to encourage metropolitan and other urban areas; administrative and financial assistance in connection with recreation and transportation planning; administration of urban open-space program. The Secretary

of Housing and Urban Development is directed, in administering the program of comprehensive urban planning and assistance under section 701 of the Housing Act of 1954 to encourage the planning of recreation trails in connection with the recreation and transportation planning for metropolitan and other urban areas. He is further directed, in administering the urban open-space program under title VII of the Housing Act of 1961, to encourage such recreation trails.

(c) Secretary of Agriculture to encourage States, local agencies, and private interests. The Secretary of Agriculture is directed, in accordance with authority vested in him, to encourage States and local agencies and private interests to establish such trails.

(d) Interim use of railroad rights-of-way. The Secretary of Transportation, the Chairman of the Surface Transportation Board, and the Secretary of the Interior, in administering the Railroad Revitalization and Regulatory Reform Act of 1976, shall encourage State and local agencies and private interests to establish appropriate trails using the provisions of such programs. Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with the National

Trails System Act, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes. If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Board shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this Act, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.

(e) Designation and marking of trails; approval of Secretary of the Interior. Such trails may be designated and suitably marked as parts of the nationwide system of trails by the States, their political subdivisions, or other appropriate administering agencies with the approval of the Secretary of the Interior.

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49 C.F.R. § 1152.29 Prospective use of rights-of-way for interim trail use and rail banking, effective June 6, 1986.

(a) If any state, political subdivision, or qualified private organization is interested in acquiring or using a right-of-way of a rail line proposed to be

abandoned for interim trail use and rail banking pursuant to 16 U.S.C. 1247(d), it must file a comment (in a regulated abandonment proceeding) or a petition (in an exemption proceeding) indicating that it would like to do so. The comment or petition must include:

(1) A map depicting, and an accurate description of, the right-of-way, or portion thereof (including mileposts), proposed to be acquired or used;

(2) A statement indicating the user's willingness to assume full responsibility: for managing the right-of-way; for any legal liability arising out of the use of the right-of-way (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability); and for the payment of all taxes assessed against the right-of-way; and

(3) An acknowledgment that interim trail use is subject to the user's continuing to meet its responsibilities described in paragraph (a)(2) of this section, and subject to possible future reconstruction and reactivation of the right-of-way rail service. The statement must be in the following form:

*Statement of Willingness to Assume Financial Responsibility*

In order to establish interim trail use and rail banking under 16 U.S.C. 1247(d) and 49 CFR 1152.29, XXXXXXXXXX (Interim Trail User) is willing to assume full responsibility for management

of, for any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against the right-of-way owned by XXXXXXXXXX (Railroad) and operated by XXXXXXXXXX (Railroad). The property, known as XXXXXXXXXX (Name of Branch Line), extends from railroad milepost XXXX, near XXXXXXXXXX (Station name), to railroad milepost XXXX, near XXXXXXXXXX (Station name), a distance of XXXX miles in XXXXXXXXXX County(ies), XXXXXXXXXX (State(s)). The right-of-way is part of a line of railroad proposed for abandonment in Docket No. AB- XXXXX (Sub-No. XXXXXXXXXX A map of the property depicting the right-of-way is attached.

XXXXXXXXXX (Interim Trail User) acknowledges that use of the right-of-way is subject to the user's continuing to meet its responsibilities described above and subject to possible future reconstruction and reactivation of the right-of-way for rail service. A copy of this statement is being served on the railroad(s) on the same date it is being served on the Commission.

(b)(1) In regular (regulated) abandonment proceedings under 49 U.S.C. 10903-04, interim trail use statements must be filed within the 30-day protest and comment period following the date the abandonment application is filed. *See* § 1152.25(c).

(2) In exemption proceedings, a petition containing an interim trail use statement must be filed within 10 days after the date the Notice of Exemption is published in the Federal Register.

(3) If the regular abandonment or exemption request is investigated, comments will be accepted at any time during the time provided for making evidentiary filings in the investigation.

(4) In Conrail abandonment proceedings under NERSA, interim trail use statements must be filed within 60 days after the date that Conrail's abandonment application is filed.

(5) When an interim trail use comment(s) or petition(s) is filed, the railroad must submit a reply to the Commission within 10 days after the date the Commission issues a Notice of Findings in regular abandonment proceedings, and within 10 days after the date a petition requesting interim trail use is filed in an exemption or NERSA proceeding indicating whether and with whom it intends to negotiate an agreement.

(c) *Regular and NERSA Abandonment Proceedings.* (1) If continued rail service does not occur pursuant to § 1152.27, and a railroad intends to enter into an interim trail use/rail banking agreement, then the Commission will issue a Certificate of Interim Trail Use or Abandonment (CITU) to the railroad and to the interim trail user for that portion of the right-of-way to be covered by the agreement. The CITU will: permit the railroad to discontinue service, cancel

tariffs, and salvage track and material consistent with interim trail use and rail banking, as long as it is consistent with any other Commission order, 30 days after the date it is issued (10 days after issuance in Conrail proceedings); and permit the railroad to fully abandon the line if no agreement is reached 180 days after it is issued, subject to appropriate conditions, including labor protection, and environmental matters.

(2) The CITU will indicate that interim trail use is subject to future restoration of rail service, and subject to the user continuing to meet the financial obligations for the right-of-way. The CITU will also indicate that, if the user intends to terminate trail use, it must send the Commission a copy of the CITU and request that it be vacated on a specified date. The owner of the right-of-way will be permitted to abandon it on that date.

(3) If an application to construct and operate a rail line over the right-of-way is authorized under 49 U.S.C. 10901 and 49 CFR 1150, or exempted under 49 U.S.C. 10505, then the CITU will be vacated accordingly.

* * *

49 C.F.R. § 1152.29 [Amended], effective January 9, 1988.

* * *

7. Section 1152.29(b)(1), (2), and (4) are amended by removing the words "must be filed" from each paragraph and inserting in their place in each paragraph the words "are due".

8. Section 1152.29 is amended by adding new paragraphs (b)(6) and (b)(7), by revising paragraphs (c)(2) and (d)(2), and by adding new paragraphs (e), (f), and (g) to read as follows:

* * *

(b) * * *

(6) Late-filed trail use statements must be supported by a statement showing good cause for late filing.

(7) In proceedings where a Trails Act request is made, the Commission will determine whether the Trails Act is applicable.

(c) * * *

(2) The CITU will indicate that interim trail use is subject to future restoration of rail service, and subject to the user continuing to meet the financial obligations for the right-of-way. The CITU will also indicate that, if the user intends to terminate trail use, it must send the Commission a copy of the CITU and request that it be vacated on a specified date. The Commission will reopen the abandonment

proceeding, vacate the CITU, and issue an effective abandonment certificate for the involved portion of the right-of-way. Copies of the abandonment certificate will be sent to:

(i) The abandonment applicant;

(ii) The owner of the right-of-way; and

(iii) The current trail user.

* * *

(e) Where late-filed trail use statements are accepted, the Director (or designee) will telephone the railroad to determine whether abandonment has been consummated and, if not, whether the railroad is willing to negotiate an interim trail use agreement. The railroad shall confirm, in writing, its response, within 5 days. If abandonment has been consummated, the trail use request will be dismissed. If abandonment has not been consummated but the railroad refuses to negotiate, then trail use will be denied. If abandonment has not been consummated and the railroad is willing to negotiate, the abandonment proceeding will be reopened, the certificate of abandonment decision granting an exemption or notice of exemption will be vacated, and an appropriate CITU or NITU will be issued. The effective date of the CITU or NITU will be the same date as the vacated certificate, decision, or notice.

52 FR 46773.